United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

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76-1595

To be argued by
JONATHAN J. SILBERMANN

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

-against-

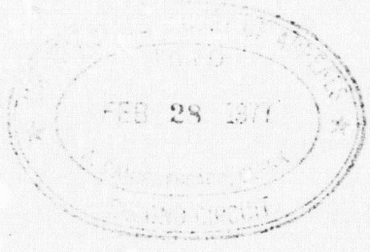
WILLIAM WESTMORELAND,

Defendant-Appellant.

Docket No. 76-1595

BRIEF FOR APPELLANT

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK



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BRIEF FOR APPELLANT

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

QUESTION PRESENTED

Whether the Assistant United States Attorney's improper cross-examination of appellant and the admission into evidence of impermissible proof of a subsequent wrongful act require reversal of the judgment.

STATEMENT PURSUANT TO RULE 28(a)(3)

Preliminary Statement

This is an appeal from a judgment of the United States District Court for the Southern District of New York (The Honorable Constance Baker Motley) rendered on December 17, 1976, after a jury trial, convicting appellant William Westmoreland of possessing a check stolen from a bank, in violation of 21 U.S.C. §2113(c) (Count Two), and sentencing him to five years' imprisonment. Execution of sentence was suspended, and appellant was placed on probation for a period of five years. As a special condition of probation, payment of $20,000 to the bank was also required.

The Legal Aid Society, Federal Defender Services Unit, was continued as counsel on appeal, pursuant to the Criminal Justice Act.

Statement of Facts

A. The Indictment[1]

In an indictment filed April 9, 1976, appellant William Westmoreland and co-defendant Yolanda McLaurin were charged with embezzling a $20,000 check from the National Bank of

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[1]The indictment is "B" to the separate appendix to appellant's brief.

North America ("the Bank") (Count One) (18 U.S.C. §§656, 2) and possessing that check, knowing it to have been stolen from the Bank (Count Two) (18 U.S.C. §§2113(c), 2).

B. The Trial

1. The Government's Case

Appellant Westmoreland's co-defendant, Yolanda McLaurin, was the Government's principal witness.[2] Ms. McLaurin testified that some time in October 1973 appellant, while working as a security guard for E. J. Korvette's, arrested her for shoplifting (237) and, that as a result of this arrest, she entered a plea of guilty to disorderly conduct (240, 294-295). According to the co-defendant, after her arrest, appellant telephoned her and they commenced an intimate relationship that lasted for approximately 10 months (239, 300, 422).[3] McLaurin stated that she saw appellant three or four times a week during that period (241, 300, 309).

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[2]Pursuant to an agreement between the Government and co-defendant McLaurin, McLaurin was not tried for the offenses charged in the indictment, but rather was granted "a deferred prosecution" (236, 343). (Numerals in parentheses refer to pages of the trial transcript.)

[3]McLaurin testified that appellant told her she might have to pay a large fine as a penalty for shoplifting. According to McLaurin, appellant gave her a $200 check to cover this fine. This check, which McLaurin did not cash (329), was never produced (239, 327-329). McLaurin testified that she gave the check to bank officials (329-330).

During January 1974 McLaurin began working as a mail teller at a branch of the Bank located in Manhattan (242). According to McLaurin, in June 1974 appellant asked her to "get a check" from the Bank and to deposit the check in appellant's business account in the Far Rockaway branch of the Bank (249-250, 253).[4] The co-defendant stated that on July 2, 1974, in the course of her employment in the Bank, she received a $20,000 check payable to the Bank and that she took the check home that evening and showed it to appellant. According to the co-defendant, appellant held the check in his hands, telling McLaurin that he would give her a deposit slip for his account (251-253, 347, 360-362). The co-defendant testified that approximately one week later appellant gave her that deposit slip (254-255). Using intra-bank mail, McLaurin then mailed the check, along with appellant's deposit slip, to the Far Rockaway branch of the Bank, where it was deposited to appellant's account (257-258).[5] Ms. McLaurin alleged that approximately one week after depositing the check, she spoke with appellant, who then indicated that the check was deposited

[4]Catherine Raines, an employee of the Bank, testified that on June 19, 1974, appellant opened a business account in the Far Rockaway branch of the Bank. The account was opened in the name of Westmoreland Domesticare (67-69, 72-73, 75-77).

[5]Joseph Dente, manager of the Far Rockaway office of the Bank in 1974, testified as part of the Government's case. During the course of his testimony, a copy of the monthly statements for Westmoreland Domesticare, as well as the checks written on that account during the summer of 1974, were entered in evidence (110). The statement showed that appellant drew on the $20,000 that had been deposited (118).

but "it must not have went in his account," since the Bank wanted to speak with him (262).

On cross-examination, McLaurin admitted lying on her employment application to the Bank (380-381) and giving false information to Bank officials who interrogated her at the end of August 1974 (385, 396), as well as to FBI agents in a written statement furnished on September 5, 1974 (364-367, 397).

As part of the proof of the crimes charged, the Government, on its direct case, elicited testimony about a check dated August 30, 1975, written on appellant's closed checking account at a branch of the Chemical Bank in Lawrence, New York. The Government justified this testimony on the ground that the events constituted a subsequent similar act (461). Defense counsel's objection to admission of this proof on the grounds that the facts alleged were not similar to the crimes charged and were relevant only to propensity (461-463) was overruled by the district court, which found the evidence relevant to appellant's "intent" (463).

Thus, Virginia Sciame, an employee of the Chemical Bank branch in Lawrence, New York, testified that on June 14, 1973, appellant opened a checking account at that bank (492); that the account was closed on February 27, 1974 (494); and that a check dated August 30, 1975, payable to British Airways, was drawn on appellant's closed account.[6] This $772 check --

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[6]Prior to Sciame's testimony, a stipulation was read to the jurors. The stipulation indicated that on November 15,

ultimately not honored by Chemical Bank -- as well as the application for the account, the signature card, a record of check order, and a computer card showing the existence of the account were all admitted into evidence (491-492, 498-500, 503-504) (GX 49-52, 55[7]).

Moreover, Leonard Levy, a security officer for British Airways, corroborated Sciame's testimony, stating that a check drawn on appellant's account had been given to British Airways for payment of tickets and that the check had not been paid by Chemical Bank (505-506). However, Levy testified that he was unable to ascertain whether the tickets purchased were ever used (511-512).

2. The Defense Case

FBI Agent Michael Shea testified as part of appellant's case. He stated that the $20,000 check had been analyzed for fingerprints, and that only one latent fingerprint -- that of co-defendant McLaurin -- was found on the check (640).

Over defense counsel's objection (689), the defense case was then interrupted to allow the Government to reopen its

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(Footnote continued from the preceding page)

1973, Chemical Bank had mailed a letter to appellant notifying him that the account would be closed as of November 30, 1973 (497).

[7]Numerals in parentheses preceded by "GX" refer to numbers of the Government Exhibits admitted in evidence.

case so that additional testimony relating solely to the alleged subsequent similar act could be elicited. Thus, Patrick Murray, assistant manager for the North Bellmore, New York, branch of Chemical Bank, testified that appellant opened a checking account in that branch on June 5, 1973, and that the account was closed on February 21, 1974 (701, 704). Murray stated that after searching all the signature cards for checking and savings accounts at the North Bellmore branch, he found only the one closed account (703).

After this interruption, the defense case continued, and appellant testified on his own behalf. Mr. Westmoreland explained that in the course of his employment as a security guard at Korvette's in Lawrence, New York, he saw co-defendant McLaurin shoplifting and detained her for the authorities (731, 736). Approximately one week later, co-defendant McLaurin, known to appellant as Yolanda Bonds (799), telephoned appellant and asked that he meet with her at Nathan's, where the co-defendant then worked (739). Appellant agreed. At the meeting, McLaurin told appellant that she had a child, and expressed concern that she would lose custody of her child because of the possible future conviction resulting from her arrest. Hoping that her parents would not learn of the incident, co-defendant McLaurin requested that Korvette's drop the charges. Appellant told McLaurin that the matter was out of his control (739).

Appellant testified that, at McLaurin's behest, he met with her a number of times within the next month. At those

meetings, McLaurin again expressed concern over her criminal charge, and asked appellant to lend her money to pay any fine that might be imposed (741-742).[8]

Moreover, appellant stated that thereafter co-defendant McLaurin would telephone him frequently, requesting that he perform various chores for her and her family, which appellant did (747-752). After December 1973, appellant did not see McLaurin again until July 10, 11, or 12, 1974, when the co-defendant came to appellant's apartment, telling appellant that she wanted to talk with him (754, 756). Appellant refused to let McLaurin into his apartment, and the co-defendant left (755). Appellant denied ever having had sexual relations with McLaurin (779), disputing McLaurin's claim that the two had been romantically involved (778-779).

Appellant testified that during May, June, or July, he remembered opening a business checking account for Westmoreland Domesticare at the Far Rockaway branch of the Bank. Appellant stated that he was working with the Hi Lo Professional Home Cleaning Corporation, explaining·

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[8]Appellant explained that while he initially refused Ms. McLaurin's requests for money, he ultimately gave her a $200 check, asking the co-defendant not to cash it (743). A short time thereafter he gave McLaurin $200 in cash, repeatedly requesting that his check be returned (744-745, 747). Appellant stated that his co-defendant told him she had destroyed the check (747).

> I was a subcontractor for the Hi Lo Professional Home Cleaners. I did subcontracting for them which meant I had to set up my own company account.
>
> (758).

Appellant testified that in July 1974 he received a deposit slip in the mail which reflected that $20,000 had been deposited in the Domesticare account (781-782). According to appellant, he then called his attorney, Mr. Robert Weitz, who advised appellant that he saw no reason why appellant should not spend the money (784, 787), which appellant did (793-794, 836). Appellant testified that he never encouraged or demanded that co-defendant McLaurin steal any check (840).

Further, appellant testified that his August 1975 purchase of airlines tickets with a check written on his closed account was a mistake. Appellant explained that he had checking accounts at both the North Bellmore and Lawrence branches of Chemical Bank and that, while the Lawrence account was closed during the summer of 1975, the North Bellmore account was still open. Appellant stated that, in his rush to the airport, he inadvertently inserted into his checkbook checks left over from the closed account, and used one of those checks to purchase the tickets. Appellant explained that the tickets purchased with the check were never used, since he missed the flight (720-722, 724, 727-728).

On cross-examination, the Assistant United States Attorney asked appellant whether Domesticare was a subsidiary of Hi Lo.

Appellant repeated his previous testimony that he was a sub-contractor -- not a subsidiary -- of Hi Lo, and was required to form his own company so that he could act in that capacity (878).

The Assistant United States Attorney then asked:

> Is it a fact, is it not, that you had a route which Hi Lo assigned you to and you performed services for those customers on that route, is that not correct?
>
> A. When I was working directly for Hi Lo, yes.
>
> Q. Isn't it a fact that when you had that route you stole money from Hi Lo?
>
> A. That is incorrect.
>
> (878).

Defense counsel objected to the questioning, and at the ensuing sidebar conference, requested a mistrial (878). Justifying his inquiry on the ground it was relevant to credibility and a proper subject of cross-examination (880), the Assistant United States Attorney explained:

> Mr. Westmoreland on direct examination testified that he had a legitimate business, that he worked, on direct examination, as a subsidiary for Hi Lo, not as a subcontract. The Government has a good faith basis for asking the question to establish that he was in fact fired from Hi Lo, he was fired from Hi Lo because he embezzled funds and that he took those funds in the following way: He would tell Hi Lo, his employer, that the customers on the route were no longer going to be customers, that they had cancelled their contract with Hi Lo and what Mr. Westmoreland then did was to continue to service those customers and take the money on his own and that, in

fact, he did that together with George Drab and that both of them were fired.

(879).

The district court denied a mistrial, allowing the Assistant United States Attorney to pursue this line of questioning:

> Q. Mr. Westmoreland, isn't it a fact that you told Hi Lo that the customers you were servicing had cancelled their contracts but in fact you continued to service them on your own, isn't that a fact?
>
> A. The customers didn't have a contract with Hi Lo. The customers I serviced.
>
> Q. Isn't it a fact you told Hi Lo that the customers you serviced were no longer seeking services and then you continued to service them on your own?
>
> A. That is not correct.
>
> Q. Isn't it a fact that you were fired from Hi Lo because of this kind of activity?
>
> A. I was never hired by Hi Lo. I was a subcontractor, they couldn't fire me.

(882-883).

Not satisfied with the answers elicited, the Assistant United States Attorney continued:

> Q. Isn't it a fact they cancelled any kind of agreement with you because of this kind of misconduct on your part?
>
> A. That's incorrect.

(883).

Defense counsel's objection to the characterization of appellant's activities as "misconduct" was overruled (883). The Assistant United States Attorney continued:

Q. Isn't it a fact that George Drab helped you in this kind of scheme at Hi Lo?

(883).

Defense counsel's objections to this question were similarly overruled. Accusing appellant and another person -- George Drab -- of stealing money, the Assistant United States Attorney asked:

Q. Didn't George Drab help you steal money from Hi Lo?

A. Help me steal money? I didn't handle money from Hi Lo.

Q. Weren't you fired from Hi Lo together?

A. I was never fired because I was never hired.

(884).

3. The Government's Rebuttal Case

Mr. Murray, of the North Bellmore Branch of Chemical Bank, was recalled as part of the Government's rebuttal case. He testified that he found an additional account -- a savings account -- for appellant at that branch, explaining that it had been misfiled (948).[9]

After the conclusion of the testimony, appellant moved to strike the testimony about the check written on the closed

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[9] Robert Weitz, appellant's former attorney, also testified. He stated that when appellant asked him about the deposit, he told appellant that he was unable to advise him about his rights and responsibilities, but that appellant should contact the bank about the matter (918-919, 943).

account (977). The motion was denied (982-983).

On summation, the Assistant United States Attorney detailed with great specificity the Government's proof pertaining to the check written in August 1975 on appellant's closed account (1052-1056), and argued that these circumstances were proof of appellant's intent to commit the crimes charged one year earlier (1052).

During her instructions to the jurors, the district judge told them that if an objection to a question were sustained, they were to disregard the question, but that if an answer were stricken, the jurors were to disregard both the question and the answer:

> If, during the course of the trial, a question was asked, an objection interposed, and I sustained the objection, you are to disregard the question and any alleged facts contained in the question.
>
> Similarly, if I ruled that an answer be stricken from the record, you are to disregard both the question and the answer in your deliberations.
>
> (1117).[10]

C. The Verdict

After deliberations, the jury returned a verdict acquitting appellant of aiding and abetting the embezzlement of the $20,000 check (Count One), but convicting him of possession of that check (Count Two).

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[10] The complete charge of the district court is "C" to the separate appendix to appellant's brief.

ARGUMENT

THE ASSISTANT UNITED STATES ATTORNEY'S IMPROPER CROSS-EXAMINATION OF APPELLANT WESTMORELAND AND THE ADMISSION INTO EVIDENCE OF IMPERMISSIBLE PROOF OF A SUBSEQUENT WRONGFUL ACT REQUIRE REVERSAL OF THE JUDGMENT.

A. The testimony that appellant wrote a check dated August 30, 1975, on a closed account was not admissible to show his intent to commit the crimes charged more than one year earlier.

While the district court is granted broad discretion to permit proof of "similar" acts (see, e.g., United States v. Papadakis, 510 F.2d 287, 294 (2d Cir.), cert. denied, 421 U.S. 950 (1975); United States v. Torres, 519 F.2d 723, 727 (2d Cir. 1975); United States v. Deaton, 381 F.2d 114, 117 (2d Cir. 1967); United States v. Bozza, 365 F.2d 206, 213 (2d Cir. 1966); Federal Rules of Evidence, §404(b)), the simple prerequisite for this kind of evidence is that the prior conduct be in fact similar to the criminal offenses in issue. 2 J. Wigmore, A TREATISE ON EVIDENCE, §302 at 200 (3d ed. 1940); United States v. Gocke, 507 F.2d 820, 824 (8th Cir. 1974), cert. denied, 420 U.S. 979 (1975); United States v. Leonard, 524 F.2d 1076, 1091 (2d Cir. 1975).

In accord with this principle, this Court has found that the required prerequisite is satisfied if there is "a close parallel between the crime charged and the acts shown." United

States v. Leonard, supra, 524 F.2d at 1091; see also United States v. Santiago, 528 F.2d 1130, 1134 (2d Cir.), cert. denied, 425 U.S. 972 (1976) ("similarity of conduct"); United States v. Gocke, supra, 507 F.2d at 825 ("It is enough that the evidence be of similar involvement reasonably related to the offending conduct...."); United States v. Wetzel, 514 F.2d 175, 178 (8th Cir. 1975); United States v. Kaufman, 453 F.2d 306, 311 (2d Cir. 1971).

Here, the necessary parallel conduct was utterly lacking. During the Government's case-in-chief, in interruption of the defense case, and in rebuttal, the Government elicited proof that appellant had written a check dated August 30, 1975, on a closed checking account, argui[illegible] that this evidence was probative of appellant's intent to commit criminal acts more than one year earlier. However, there was no factual or legal[11] similarity between the August 1975 "bounced" check and the charges arising from the bank embezzlement. See United States v. Klein, 515 F.2d 751, 757 (3d Cir. 1975); compare United States v. Chestnut, 533 F.2d 40, 50 (2d Cir. 1976); United States v. Santiago, supra, 528 F.2d at 1134; United States v. Leonard, supra, 524 F.2d at 1091; United States v. Kaufman, supra, 453 F.2d at 311. Although it is true that both incidents involved checks, the "similar" act related to issuing a

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[11]Compare New York Penal Law §190.05, issuing a bad check (Class B misdemeanor), with 18 U.S.C. §§656 and 2113(c).

check directly to an airline in payment for tickets, while the indictment charged crimes occurring one year earlier involving a very different situation -- theft of a check from a bank and possession of a check knowing it to have been so stolen.

Thus, since the "similar" act was unrelated both in fact and in time to the offenses charged, its proof could not aid the jurors in their determination of appellant's intent. See United States v. Klein, supra, 515 F.2d at 757; compare United States v. Chestnut, supra, 533 F.2d at 50. Rather, it inevitably and impermissibly tainted appellant as a "bad" man. See Michelson v. United States, 335 U.S. 469, 475-476 (1948); United States v. Ruiz, 513 F.2d 1001, 1004 (6th Cir. 1975).

B. The Assistant United States Attorney's cross-examination of appellant was improper.

During his direct testimony, appellant stated that he had opened a business account at the Bank so that he could act as a "subcontractor" (758) for Hi Lo Home Cleaning Corporation. On cross-examination, appellant confirmed his previous testimony, explaining that he was a subcontractor for -- not an employee of -- Hi Lo (877-878). Despite this explanation, the Assistant United States Attorney asked:

> Isn't a fact that when you [appellant] had that route you stole money from Hi Lo?
>
> (878).

At the sidebar conference which followed this question,

the prosecutor made clear that this line of cross-examination was based on a misapprehension of appellant's direct testimony. Thus, the prosecutor incorrectly contended that appellant had previously testified that he had been a subsidiary of Hi Lo. Based on this misunderstanding, the Assistant United States Attorney justified his cross-examination in his offer of proof, asserting that appellant was fired by Hi Lo for embezzling funds:

> He [appellant] would tell Hi Lo, his employer, that the customers on the route were no longer going to be customers, that they had cancelled their contracts with Hi Lo, and what Mr. Westmoreland then did was to continue to service those customers and take money on his own and, in fact, he did that together with George Drab and that both of them were fired.
>
> (879).

Despite the fact that this cross-examination was grounded on a misunderstanding of prior testimony, and over defense counsel's objections and request for a mistrial, the district court permitted further questions in this area. By this additional cross-examination, the Assistant United States Attorney insinuated that appellant illegally schemed with George Drab to "steal" money from Hi Lo (882-884).

Thus, the Assistant United States Attorney's cross-examination was improper not only because the necessary factual predicate for the Government's assertion of illegal conduct (i.e., that appellant had testified that he was an employee of Hi Lo) was lacking, but also because it implied unlawful conduct which simply did not exist. 3 Wigmore, EVIDENCE, §780 at 173(c)

(Chadbourn rev. 1970); cf. United States v. Semensohn, 421 F.2d 1206 (2d Cir. 1970). That the conduct, as alleged, did not constitute illegal activity is clear. While competition by a former employee or subcontractor may violate contractual agreements, it does not constitute theft from the employer or general contractor involved.

Moreover, this cross-examination was also improper because it "by implication put into the mouth of an unwilling witness a statement he never intended to make...." 3 Wigmore, EVIDENCE, §780 at 171 (Chadbourn rev. 1970).[12]

While appellant denied any wrongdoing, this did not cure the error caused by the cross-examination, since the jurors were permitted to draw negative inferences from the testimony elicited. Dyer v. MacDougall, 201 F.2d 265, 269 (2d Cir. 1952); United States v. Jenkins, 510 F.2d 495, 499 (2d Cir. 1975); United States v. Weinstein, 452 F.2d 704, 714 n.14 (2d Cir. 1971); United States v. Tropiano, 418 F.2d 1069, 1075 (2d Cir. 1969). Thus, the error lies in the questions posed on cross-examination itself, and in the consequent impermissible impli-

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[12]Wigmore, supra, at 171 n.1, illustrates this error in a familiar anecdote:

> Sir Frank Lockwood was once engaged in a case in which Sir Charles Russell ... was the opposing counsel. Sir Charles was trying to browbeat a witness into giving a direct answer, "Yes," or "No." "You can answer any question yes or no," declared Sir Charles. "Oh, can you," retorted Lockwood. "May I ask if you have left off beating your wife?"

cations to be drawn therefrom. Cf. Doyle v. Ohio, 44 U.S.L.W. 4092, 4094 n.10 (June 17, 1976).

Moreover, the district court's instructions to the jurors did not cure the error. To the contrary, these instructions erroneously allowed the jurors to consider the facts contained in the questions, since objections to the offending questions were overruled and the jurors told to disregard only those questions to which objections were sustained or which resulted in answers stricken from the record (1117).

The cumulative effect of the errors involved here was crucial to the jurors' evaluation of the case. The only direct evidence of appellant's knowing involvement in the crimes charged came from the mouth of appellant's co-defendant. Not only was McLaurin's version of the facts contradicted by a credible explanation alleged by appellant, but McLaurin's testimony itself was suspect, given her obvious motive to lie: this, after all, was the witness who had been arrested by the man she was now accusing.

Thus, it was extremely damaging for the prosecution to have been able to label appellant a thief and a swindler. The Government recognized the importance of this evidence by its repeated references to the bounced check in summation, by the lengthy amount of testimony, and by its over-zealous insistence upon interrupting the defense case to introduce testimony on this peripheral issue. This prejudice was only compounded by the extent and manner of cross-examination on what was, at

worst, questionable business practices -- not criminal acts -- engaged in by appellant. In sum, the errors were grievously prejudicial. Indeed, if there were any doubt about this fact, it must be dispelled by the utterly inexplicable verdict rendered by the jury. Even if the errors here were insufficient individually to warrant a new trial, their cumulative effect surely requires reversal for such relief (see United States v. Alfonso-Perez, 535 F.2d 1362, 1365, 1367 (2d Cir. 1976); cf. United States v. Fields, 466 F.2d 119, 121 (2d Cir. 1972)) where the jury's determination can be based upon relevant evidence rather than character assassination.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be reversed and the case remanded for a new trial.

Respectfully submitted,

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February 28, 1977

CERTIFICATE OF SERVICE

Feb 28, 1977

I certify that a copy of this brief [redacted] has been mailed to the United States Attorney for the Southern District of New York.

Jonathan Silberman